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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1136

WARNER ERNEST ENSKAT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Court of Appeal of the State of California, entered

against Petitioner in the above-entitled case on August 8, 1973, not issue.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five, rendered on August 8, 1973, is reported in 33 Cal. App. 3d 900, 109 Cal. Rptr. 433. A copy of the opinion appears in Appendix A of Petitioner's petition. The Petitioner has also appended to his petition other prior opinions in this case which either are vacated or moot.

JURISDICTION

The judgment of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five (Petitioner's Appendix A) was entered on August 8, 1973. A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was

denied on October 24, 1973. A copy of the order denying the petition for hearing by the California Supreme Court appears in Appendix D hereto. The judgment of the Court of Appeal, as aforestated, is a final judgment, and jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner's conviction in this case, for violation of California Penal Code § 311.2, is violative of the First and Fourteenth Amendment and the decisions of this court rendered on June 21, 1973, in Miller v. California, __U.S. ___, 37 L.Ed.2d 419, 93 S.Ct. 2607, et al.

2. Whether that portion of California's test of obscenity that the matter be "utterly without redeeming social importance", renders California Penal Code Section 311.2 violative of the First and Fourteenth Amendments because of

vagueness, ambiguity, uncertainty and overbreadth.

3. Whether Petitioner's conviction, based on statewide contemporary standards of prurient interests and customary limits of candor, rather than national standards, violates the First and Fourteenth Amendments.

4. Whether the provisions of California Penal Code Sections 311 and 311.2, which do not specifically define the exact sexual conduct which must be depicted or described in order to come within the provisions of said sections, are vague, uncertain, overbroad and ambiguous, in violation of the First and Fourteenth Amendments.

5. Whether the court below held that California Penal Code Sections 311 and 311.2 were not required to specifically define sexual conduct as long as said sections retained the test of "utterly without redeeming social importan-

ce", and, if it so held, whether said holding was correct under the First and Fourteenth Amendments and this court's decisions of June 21, 1973, in Miller, et al.

6. Whether the decision of the court below was correct in ruling that California Penal Code Sections 311 and 311.2 had been "authoritatively construed" as required by this court in Miller, et al.

7. Whether the court below held that California Penal Code Sections 311 and 311.2 were constitutional regardless of whether or not they had been "authoritatively construed", on the ground that the California statute establishes more stringent standard of proof for the prosecution, and therefore satisfies the requirements of Miller, et al, and if it so held, whether said holding was correct.

8. Whether provisions of California law which allegedly allow jurors to disregard so-called "expert" evidence of community stand-

ards are violative of the First and Fourteen-the Amendments.

9. Whether the matter exhibited by the Petitioner, which resulted in his conviction, was obscene.

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code Sections 311 and 311.2 appear in Appoendix E of Petitioner's petition.

California Penal Code Section 312.1 states:

> "In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning

the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question or redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense. (Added by Stats. 1969, c. 925, p. 1854, § 1. Amended by Stats. 1970, c. 1072, p. 1910, § 3.)"

California Penal Code Section 1127b states:

"When, in any criminal trial or proceeding, the opinion of any

expert witness is received in evidence, the court shall instruct the jury substantially as follows:

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

No further instruction on the subject of opinion evidence need be

given. (Added by Stats. 1929, c. 876, p. 1939, § 1.)"

STATEMENT OF THE CASE

Petitioner was charged with two counts of violating California Penal Code §311.2 by the exhibition at the Avon Theatre in the County of Los Angeles on September 19, 1970, of motion pictures entitled "The Collection" and "Man to Man." Following a trial by jury, petitioner was convicted with respect to the film "The Collection", and was acquitted with respect to the film "Man to Man." On appeal, the judgment of conviction was reversed and the cause remanded for a new trial because secondary evidence of the film's contents had been improperly admitted. (Petitioner's Appendix C). A subsequent retrial again resulted in conviction and appeal was once more prosecuted to the Appellate Department of the Superior Court of the State of California for the County of Los Ange-

les. The judgment of conviction was affirmed (Petitioner's Appendix B) The Appellate Department, however, certified that a transfer of the appeal to the Court of Appeal appeared necessary to settle new and important questions of law. (Petitioner's Appendix B) On October 24, 1972, the Court of Appeal ordered that the case be transferred to Division Five and the case was submitted for decision by order of the Court of Appeal on May 31, 1973. Thereafter, on July 6, 1973, a communication was received from the Court of Appeal to respective counsel, reading as follows:

> "After studying the recent United States Supreme Court opinions on the subject of obscenity (Miller v. California, 41 L.W. 4925, et al.,) the court has come to the conclusion that fairness to all concerned demands a reargument of this case. It has been set down for July 25, 1973, at 2:30 p.m.

"The court has asked me to advise you that it is most definitely not requesting a reargument on issues already presented and argued. It is, however, interested to what extent--if any--the Miller decisions affect the pending appeal."

Accordingly, there was further briefing and argument before the Court of Appeal and an ultimate ruling by the Court affirming petitioner's judgment of conviction (Petitioner's Appendix A).

A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was denied on October 24, 1973 (Petitioner's Appendix D).

REASONS FOR DENYING THE WRIT

1. California Penal Code Sections 311 and 311.2 defines as obscene matter which, taken

as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance.

It is incorrect to state, as does Petitioner, that the statute solely embodies the test set forth in Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, inasmuch as it was enacted in 1961 and Memoirs was decided in 1966, some five years later. The California legislature merely adopted part of the definition of obscene matter set forth in Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 as one of the elements of the crime set

forth in Penal Code Section 311.2. (Zeitlin v. Arnebergh [1963] 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800.

The court below did not speak to the question of whether California Penal Code Section 311 was specific enough on its face to meet the requirements of Miller, et al., but instead limited itself to a consideration of whether it had been authoritatively construed so as to meet such requirements. The Court below did not consider whether the California statute, on its face, was directed at depiction of defined sexual conduct, as opposed to expression (Miller v. California, 37 L. Ed. 2d at 430, fn. 6), or whether it was an existing state statute which "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices"(Miller v. California, 37 L. Ed. 2d at 433, fn. 10). While Miller has been apparently interpreted as inferring that California Penal Code Section 311 is not

specific enough on its face, Petitioner submits that it is somewhat more specific than other statutes which have been saved, such as 19 USC §1305(a) and 18 USC §1462 (U.S. v. 12 200-Ft. Reels, __U.S.__, 37 L.Ed.2d 500, 507, fn. 7, 93 S.Ct. 2665). Respondent submits that the more specific the statutes, the better its chances of validity in light of valid construction. Petitioner has appended legislation which was defeated by California voters by better than a 2-1 margin, which was somewhat more specific in its definitions, indicating to Respondent that perhaps two-thirds of California voters felt that Section 311 was already specific enough.

In any event, the court below ruled that California Penal Code Section 311 and 311.2, as they had been authoritatively construed in the past, were valid in light of Miller, et al. With this conclusion, Petitioner agrees.

2. Part of the test of obscenity under which Petitioner was convicted was the requirement

that the matter be shown to be "utterly without redeeming social importance." As this court correctly pointed out in Miller (37 L. Ed. 2d at 429), this test called on the prosecution to prove a negative, "--a burden virtually impossible to discharge under our criminal standards of proof." Nevertheless, the prosecution did so in this case, and the test of which Petitioner now complains is one which, until now, he has been content, if not delighted, to live with for 13 years.

Petitioner has seized upon the fact that this court reduced the prosecution's burden to claim that California's statute, containing, as it does, such a test, is obviously unconstitutional on its face. The most direct answer to this claim is that if it were correct, this court would have so held in Miller, supra, and in Kaplan v. California ___U. S. ___, 37 L. Ed. 2d 492, 93 S. Ct. 2680.

What this court did with regard to the test

is that it said it is no longer required as stated, and made permissible a new element which is both more realistic, more semantically intelligible, and, as a consequence, easier for the prosecution to establish. The initiative proposal set forth in Petitioner's Appendix F, which he cites with such approval, while perpetuating the language he is suddenly arguing is vague, would not have met the Miller requirements of social value.

Petitioner submits that nothing this court said in Miller, et al., can be fairly construed to imply that a conviction based partly on a required finding that the matter was utterly without redeeming social importance can be said to be constitutionally invalid.

3. Petitioner's trial was conducted, and his conviction was obtained, upon a theory that a national standard of First Amendment protection applied. (Miller v. California, __U.S.__, 37 L.Ed.2d at 435). Also, as in Miller, proof

of contemporary standards of prurient interest and customary limits of candor, the so-called "community standard", was of such standards as they existed in the entire State of California, and not of some smaller area or of the entire nation. Both of these concepts were approved by this court in Miller, et al., and both of them continue to be applied in California today. It seems to Respondent that Petitioner fails to distinguish between the two concepts in his argument.

If one accepts Petitioner's theory that a national standard of First Amendment protection is now "clearly unconstitutional", and only a statewide standard can apply, it is difficult to see how this or any other obscenity case can possibly present a federal question. Actually, this court left unsettled the question of how small a geographic area may be and still establish a viable standard (albeit of pruriency and limits of candor). Under Petitioner's theory, the stan-

dard of First Amendment protection may end up as small as a jury box. Respondent doubts that Petitioner seriously desires this.

4. There exists no express authority for Petitioner's proposition that California Penal Code Sections 311 and 311.2 do not on their face meet the specificity requirements of Miller. Rather, it must be inferred from this court's opinions in Miller and Kaplan, and from the fact that the court below address itself only to the question of how the statute had been construed. Since this court stated that a statute might be valid as written or construed, and left the question up to the Orange County Superior Court in Miller and the Los Angeles Superior Court in Kaplan, Petitioner's argument that the statute is not specific on its face is without merit because it does not address itself to the question of whether it has been properly construed.

5. Petitioner seems to argue as if his case were tried according to the standards set forth

in Miller, et al., but by virtue of the California statute. The fact is, the standards of proof met by the prosecution in Petitioner's case were much more stringent than those which Miller allows. The record in this case utterly and completely refutes Petitioner's contention that the jury was requested to "substitute its own subjective and unguided predilections" or "licensed to create its own law of the case, its own personal standards." The falsity of this contention is demonstrated by the fact that Petitioner makes this astounding allegation for the first time in his petition to this court.

In Miller, et al., it is implicit that a conviction under California Penal Code Section 311.2 could be sustained, at the very least, if the statute had been authoritatively construed as was the statute in United States v. 12 200-Ft. Reels, supra. The court below determined that California's obscenity statutes had been so "authoritatively construed" and Respondent submits

that Petitioner's contention in this regard lacks merit.

6. On June 21, 1973, when this court decided Miller, et al., Petitioner's case was pending decision in the California Court of Appeal. Logically, following the decisions of this court, the Court of Appeal undertook to determine in Petitioner's case that which this court directed in Miller and Kaplan. Petitioner would have this court believe that the court below held that it was not bound to follow Miller if it retained he "utterly without redeeming social importance test" (Petitioner's Appendix A, p. 13). In doing so, Petitioner quotes dicta of the court completely out of context. The court below made the quoted remark in considering and rejecting Petitioner's contention there that the California statute was unconstitutional because it contained said test.

The holding of the court below, insofar as Miller is concerned, is:

"In sum, as to the issues raised by Miller v. California and its companion decisions, we hold (1) that section 311 as heretofore construed, defines obscene matter as required by Miller, except as to Miller's tolerance of an obscenity finding as to matter which is not utterly without redeeming social importance; (2) that while the work in question here meets the Miller test of lacking serious literary, artistic and other values, we cannot apply that yardstick to it, but instead must measure it against the concept of being 'utterly without redeeming social importance'; (3) that such measurement is still permissible; and (4) that so measured, the film which appellant was convicted of exhibiting is obscene."

Petitioner's Appendix A, p. 16;

Emphasis added.)

The opinion of the court below, taken as a whole rather than one sentence out of context, clearly shows that (1) the court followed Miller and looked to see if the California obscenity statutes had been authoritatively construed; (2) the court did not hold that Miller did not require that the statute be authoritatively construed if it retained the test of "utterly without redeeming social importance."

7. As previously stated, the court below held that, prior to the date Petitioner violated California Penal Code Section 311.2, California's obscenity statutes had been authoritatively construed in such a manner as satisfied the requirements of Miller, et al. Petitioner urges that this is not so, but it seems to Respondent that he is merely attempting to substitute his judgment for that of the California Court of

Appeal and the California Supreme Court.

In the first place, it seems to Respondent that this court intended by its orders in Miller, et al., that the question be left to state courts to decide. Petitioner has made no showing that the California Supreme Court and Court of Appeal are not to be trusted to carry out the mandate of this court.

To grant this petition would be tantamount to an expression of willingness by this court to review practically every previous obscenity case from each of the 50 states of the Union.

Second, it seems clear from the opinion of the court below that it was correct in holding that the California obscenity statute had been authoritatively construed so as to meet requirements even more stringent than those imposed by Miller and United States v. 12 200 Ft. Reels.

Third, at Petitioner's trial the jury was instructed that California's obscenity statutes applied only to depictions of sexual activity which

appeal to prurient interest, and it was instructed also by reading to it a prior "authoritative construction" which specifically defined the type of matter regulated (Petitioner's Appendix A, p. 11, fn. 10).

Finally, Petitioner urges that an "authoritative judicial construction" could only have issued from the California Supreme Court, and no lower court, in only one case, specifically reading into the statute particular types of sexual conduct which might not be depicted or described. Petitioner cites no authority for this proposition, but if it were true, Respondent suspects this court would have referred Miller and Kaplan to the California Supreme Court rather than to the Superior Court Appellate Departments, which, according to Petitioner have no "authority." Petitioner misunderstands this court's rulings of June 21, 1973, if he believes they held prior requirements for judging obscenity constitutionally deficient; this court would

have reversed, rather than remanding. This court remanded for the purpose of the state court determing whether its statute had been properly construed; in California's case the court's instructions were carried out and the question is properly settled.

9. Respondent does not believe Petitioner's argument regarding expert testimony presents a federal question. While Kaplan made allowance for the introduction of expert testimony by a defendant, Petitioner here did in fact introduce such testimony, and such testimony was admitted. As this court made clear in Paris Adult Theatre v. Slaton, ___U.S.__, 37 L.Ed. 2d 446, 456, 93 S.Ct. 2628 [ft. 6], such testimony is not conclusive or binding on the jury.

In Petitioner's case, the jury was instructed that it must consider all the evidence, and then it might reject the expert evidence of community standards [of prurient interest and limits of candor]. It was also instructed pursuant

to California Penal Code Section 1127b, infra.

Contrary to Petitioner's inference, California Penal Code Section 312.1 required that he be allowed to introduce expert testimony, and he did. The alternative to his argument against allowing the jury to reject it is to tell the jury it must accept and follow defendant's expert testimony. If such were the proper course, there would not have been much point in trying the Petitioner in the first place.

The instructions merely explained to the jurors how they might deal with such expert testimony if the matter was so patently offensive that the testimony was patently incredible.

10. The film upon which Petitioner's conviction rests is obscene under the First and Fourteenth Amendments and in fact. Respondent calculates that it has been adjudged obscene, either expressly or inferentially, by no less than 24 jurors and 19 California state judges. Enough is enough. The court below

understated matters when it stated "the film graphically depicts homosexual activities of four males." The only purpose in this court reviewing the film itself for an independent determination of obscenity would be to establish a new extreme of judicial experience; in addition to the usual scenes of fellatio and sodomy, it graphically depicts a form of coprophagy.

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

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